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No. 07-1159

In the Supreme Court of the United States

JAMES A. METZ, SR.,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari to decide whether petitioner is correct in his contention that temporary pain or symptoms do not trigger the Federal Employers' Liability Act's three-year limitations period, 45 U.S.C. § 56, when (1) the parties *agreed* in the court below that temporary pain or symptoms do not trigger the limitations period (and disagreed only about whether petitioner's pain and symptoms were in fact temporary) and (2) the court below affirmed summary judgment for respondent in an unexplained, non-precedential order.

RULE 29.6 STATEMENT

CSX Transportation, Inc. has a parent company, CSX Corporation, which is publicly traded. No other publicly held company owns more than 10% of respondent's stock.

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RESPONDENT'S BRIEF IN OPPOSITION

Under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which governs claims by railroad employees against their employers for workplace injuries, a cause of action accrues, and the three-year limitations period begins to run, when the plaintiff has actual or constructive knowledge that he has suffered a work-related injury. Petitioner contends that work-related pain or symptoms that are merely temporary do not trigger FELA's limitations period. He argues that the Florida District Court of Appeal held otherwise and that this Court should grant review to decide whether the lower court's decision is correct.

For multiple reasons, the petition should be denied. *First*, even if the appellate court actually had rejected petitioner's position on the issue he raises here, review would be unwarranted because the decision below is a non-precedential per curiam summary affirmance with no binding effect on parties or courts in future cases. *Second*, because the court below affirmed without opinion, the court did *not* reject petitioner's position on that issue. *Third*, if the court below is presumed to have adopted the arguments of respondent (the party in whose favor it ruled), then the only possible conclusion is that the court in fact *accepted* petitioner's position. That is because respondent never denied that temporary pain or symptoms do not trigger the limitations period, and argued only that petitioner's pain and symptoms were not temporary. *Fourth*, because petitioner's own deposition testimony established that the pain and symptoms he experienced more than three years before filing suit were not temporary, the decision of

the court below affirming summary judgment for respondent was correct.

STATEMENT

A. Statutory Background

Enacted in 1908, FELA provides a compensation scheme for injuries sustained by railroad employees in the workplace. The statute preempts state-law remedies. *Norfolk S. Ry. Co.* v. *Sorrell*, 127 S. Ct. 799, 805 (2007). Unlike workers' compensation laws, which typically provide relief without regard to fault, FELA requires an injured railroad employee to prove that his employer was negligent. 45 U.S.C. § 51. The statute provides for concurrent jurisdiction of state and federal courts, 45 U.S.C. § 56, but substantively FELA actions are governed by federal law, *Sorrell*, 127 S. Ct. at 805.

Originally, the limitations period for a FELA action was two years. Act of Apr. 22, 1908, ch. 149, § 6, 35 Stat. 66. Since 1939, however, the limitations period has been three years. Act of Aug. 11, 1939, ch. 685, § 2, 53 Stat. 1404. FELA now provides that "[n]o action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued." 45 U.S.C. § 56. An action not brought within three years of accrual is therefore barred.

The "standard rule" is that "the limitations period commences when the plaintiff has 'a complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (quoting *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941)). In *Urie* v. *Thompson*, 337 U.S. 163 (1949), however, this Court adopted a different rule for FELA actions. Under lower courts'

interpretation of that decision, a "discovery" rule governs the question of when a cause of action "accrued" under FELA, at least where the plaintiff alleges a "cumulative" illness or injury resulting from long-term exposure to a harmful condition or substance. That means that a cause of action accrues when the plaintiff knows or, in the exercise of reasonable diligence, should know both that he has been injured and that his injury is work-related.[1] Under this "objective" standard, a plaintiff "must act diligently and cannot wait until the injury is actually made known to him"—by, for example, a "medical diagnosis." *Fries* v. *Chicago & N.W. Transp. Co.*, 909 F.2d 1092, 1095-1096 (7th Cir. 1990).

B. Petitioner's Lawsuit

On April 5, 2005, petitioner filed a complaint in the Circuit Court of the First Judicial Circuit in and for Escambia County, Florida, asserting that he had been injured as a result of respondent's negligence and that respondent was liable under FELA. The complaint alleged that petitioner had suffered injuries to his right shoulder, right arm, and upper extremities while working for respondent as a carman and that the injuries were cumulative in nature. 1 C.A. R. 1-3.

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[1] See, *e.g.*, *Albert* v. *Maine Cent. R.R. Co.*, 905 F.2d 541, 544 (1st Cir. 1990); *Emmons* v. *S. Pac. Transp. Co.*, 701 F.2d 1112, 1119 (5th Cir. 1983); *Mounts* v. *Grand Trunk W. R.R.*, 198 F.3d 578, 581 (6th Cir. 2000); *Greene* v. *CSX Transp., Inc.*, 843 So.2d 157, 159 (Ala. 2002); *National R.R. Passenger Corp.* v. *Krouse*, 627 A.2d 489, 495 (D.C. 1993); *Lipsteuer* v. *CSX Transp., Inc.*, 37 S.W.3d 732, 737 (Ky. 2000); *Monaghan* v. *Union Pac. R.R. Co.*, 496 N.W.2d 895, 901 (Neb. 1993); *Gay* v. *Norfolk & W. Ry. Co.*, 483 S.E.2d 216, 218 (Va. 1997).

In November 2005, petitioner was deposed. He testified that, while he had experienced random aches and pains—which he described as "pulls"—over the course of his employment with respondent, he experienced a different type of pain in January 2002. Petitioner testified that he first experienced that pain when he was attempting to close the door of a box car or loosen a hand brake and that the pain became progressively worse over the next four months. Petitioner also testified that his pain could only have been caused by his work for respondent. 2 C.A. R. 237-238, 244-253.

In March 2006, petitioner was again deposed. He again testified that he had first experienced his pain and symptoms in January 2002. 1 C.A. R. 35-38.

Medical documents that petitioner placed in the trial-court record reflect that he saw a doctor on a number of occasions between March 1 and November 6, 2002, including on May 6 and August 23, 2002. Consistent with his deposition testimony, the record of a doctor's visit on July 3, 2002 indicates that petitioner had been experiencing pain in his right shoulder for six to seven months. 3 C.A. R. 324-339.

C. The Trial Court's Decision

Respondent moved for summary judgment. It argued that petitioner's own deposition testimony established as a matter of law that, no later than January 2002, petitioner was aware or, in the exercise of reasonable diligence, should have been aware of both (1) the injuries that were the subject of his lawsuit and (2) the fact that the injuries were work-related. Because petitioner's suit was not filed until April 2005, more than three years later, respondent

argued that the suit was time-barred under FELA's three-year statute of limitations. 1 C.A. R. 8-23.

In opposing summary judgment, petitioner argued that a jury could find that he had no actual or constructive knowledge of his injuries until May 6 or even August 23, 2002. The former date, according to petitioner, was when he first complained to a doctor about the injuries that are the subject of his suit; the latter date, according to petitioner, was when he was first diagnosed with an injury. Because both of those dates are less than three years before the date on which he filed his complaint, petitioner argued that the action was not time-barred. 3 C.A. R. 286-298.

The trial court granted respondent's motion for summary judgment. Pet. App. 2-4. In a brief order, the court stated that "Defendant's Motion for Final Summary Judgment is granted," that "final summary judgment shall be entered in favor of Defendant," and that "Plaintiff shall take nothing by his Complaint." *Id.* at 3.

Petitioner then filed a motion to alter or amend the order granting summary judgment. 3 C.A. R. 345-354. The trial court denied the motion. Pet. App. 5-6.

D. The Appellate Court's Decision

Petitioner appealed to the District Court of Appeal of Florida, First District. He argued that (1) a cause of action does not accrue under FELA when the plaintiff experiences pain or symptoms that he reasonably believes to be temporary and (2) a jury could find that he reasonably believed that the pain and symptoms he experienced in January 2002 were temporary. App., *infra*, 4a-11a, 22a. Respondent did not take issue with petitioner's argument that tem-

porary pain or symptoms do not trigger FELA's limitations period. *Id.* at 13a. Instead, respondent argued that summary judgment was proper because petitioner's own deposition testimony established, as a matter of law, that his January 2002 pain and symptoms were not temporary. *Id.* at 13a-19a.

The appellate court issued a per curiam order stating that the judgment of the trial court was "AFFIRMED." Pet. App. 1. It did not issue an opinion or otherwise explain its reasoning.

Petitioner then filed a motion for rehearing and/or clarification and for a written opinion. He argued that his deposition testimony did not establish that the pain and symptoms he experienced in January 2002 were not temporary. App., *infra*, 23a-28a. The appellate court denied the motion. Pet. App. 8.

REASONS FOR DENYING THE PETITION

Petitioner contends that, when deciding whether a plaintiff had either actual or constructive knowledge of his injury for purposes of FELA's statute of limitations, a distinction must be drawn between "permanent compensable conditions" and "symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature." Pet. 23. Petitioner's position is that "[a]n employee is not deemed 'injured' under FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary." *Ibid.* Petitioner claims that the Florida District Court of Appeal rejected that position in affirming summary judgment for respondent, and he asks this Court to grant certiorari to decide whether the Florida court erred in that respect.

The petition should be denied. Even if the court below rejected petitioner's position on the legal issue as to which he seeks review here, its decision does not bind parties or courts in future cases. In any event, the court did *not* reject petitioner's position on that issue, because it affirmed without opinion. Indeed, if the court below should be presumed to have adopted the arguments of respondent, then it ruled in petitioner's *favor* on the issue, because respondent did not dispute petitioner's position on the applicable law. Finally, the decision below is correct in light of the agreed-upon legal standards and the particular evidence in this case.

A. The Decision Below Has No Prospective Effect

The decision of which petitioner seeks review is a per curiam summary affirmance issued without an opinion. For that reason, it has no precedential force. *Department of Legal Affairs* v. *District Court of Appeal*, 434 So. 2d 310, 311-312 (Fla. 1983). Even assuming that the court below rejected the proposition of law petitioner urges, therefore, its order will not bind future panels of the Florida First District Court of Appeal (or circuit courts in that district). The argument that temporary pain or symptoms do not trigger FELA's limitations period will remain open to any litigant. Indeed, the appellate court is free to adopt the position urged by petitioner "in the next case presenting the issue." E. GRESSMAN, K. GELLER, S. SHAPIRO, T. BISHOP & E. HARTNETT, SUPREME COURT PRACTICE § 6.37, at 506 (9th ed. 2007). There is thus no need for this Court's intervention.

B. The Decision Below Did Not Reject The Rule Advocated By Petitioner

Petitioner is in any event mistaken in his assertion that the court below rejected the proposition of law he urges. Precisely because the court did not explain why it was affirming the grant of summary judgment, its reasons cannot be known with certainty. Petitioner tacitly concedes as much. He is unable to say that the court below explicitly *held* that a cause of action accrues under FELA when the plaintiff experiences temporary pain or symptoms, or even that the court explicitly *stated* that a cause of action accrues in that circumstance. That is because the court did not explicitly hold, or explicitly state, *anything*—other than that the trial court's decision was "AFFIRMED." Pet. App. 1. "The essence of unexplained orders is that they say nothing." *Ylst* v. *Nunnemaker*, 501 U.S. 797, 804 (1991).

Petitioner is thus constrained to argue that the "result" reached by the court below "effectively" rejected his position that a cause of action does not accrue when the plaintiff experiences pain or symptoms that are merely temporary. Pet. 17, 18, 30. But even that is pure speculation. The court did not have to reject petitioner's position to rule against him. Indeed, as we explain below, it is far more likely that the court *agreed* with petitioner about the applicable legal standard and determined that his complaint was time-barred because the pain and symptoms he experienced were not temporary.

Petitioner also argues that the "result" reached by the court below is "contrary" to decisions of lower federal and state courts that have considered when a plaintiff is deemed "injured," and thus when a cause of action accrues, under FELA's limitations provi-

sion. Pet. 18. After discussing several lower-court decisions (Pet. 23-30), petitioner claims that those decisions "properly recognize" that a FELA cause of action does not accrue when "a railroad employee experiences symptoms he reasonably believes to be temporary" (Pet. 30). There is no such conflict. The decision of the court below is not inconsistent with the decisions on which petitioner relies because, as explained above, the appellate court expressed no view on the issue addressed in those decisions—or, for that matter, on any issue.

C. If The Decision Below Should Be Presumed To Have Adopted Respondent's Arguments, Then It *Accepted* The Rule Advocated By Petitioner

When an appellate court affirms a trial court's decision without an explanation, it may be appropriate to presume that the appellate court's decision rests on the same grounds as the trial court's. But the trial court in this case did not provide an explanation either. Pet. App. 3, 6. When both the appellate court and the trial court issue unexplained orders, it may be appropriate to presume that the appellate court is adopting the arguments of the party in whose favor it rules. That appears to be petitioner's view. See Pet. 17-18, 30-31. Such a presumption, however, affords no assistance to petitioner. Quite the contrary.

If it is appropriate to presume that a court's unexplained decision adopts the arguments of the party in whose favor it rules, then it follows that the Florida District Court of Appeal did not reject—and indeed *accepted*—petitioner's position that temporary pain or symptoms are insufficient to trigger FELA's three-year limitations period. The party for which

the court below ruled is respondent, and respondent did not argue in that court that the limitations period is triggered by temporary pain or symptoms. Instead, respondent argued that the summary-judgment record established, as a matter of law, that the pain and symptoms experienced by petitioner in January 2002—more than three years before he filed suit—were not temporary.

1. In his brief on appeal, petitioner made the same argument that he makes in this Court. "An employee is not deemed 'injured' under the FELA, and his cause of action does not accrue," petitioner said, "when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary." App., *infra*, 4a. In support of that argument, petitioner relied on the same lower-court decisions on which he relies in this Court. Compare *id.* at 4a-11a with Pet. 23-30.

In responding to that argument in *its* brief on appeal, respondent said that it "*does not dispute* the general premise of plaintiff's argument or that the cases he cites support this argument." App., *infra*, 13a (emphasis added). Respondent went on to say that petitioner's argument "nevertheless fails," because petitioner's own deposition testimony establishes that the pain and symptoms he experienced in January 2002 were not temporary. *Ibid.* Respondent's brief made that point repeatedly. For example:

- "While plaintiff had experienced temporary symptoms or 'pulls' throughout his employment with the railroad, the symptoms he experienced in January of 2002 were different and distinguishable. By plaintiff's own admission, these symptoms were not 'tempo-

rary in nature,' but instead progressively worsened from their onset in January [2002]." *Ibid.*

- "[T]he January symptoms were different from the temporary symptoms that plaintiff experienced over the course of his career[.]" *Id.* at 14a.
- "It is clear that plaintiff differentiated between the temporary aches and pains (or 'pulls') that he experienced during the course of his career and the new and specifically identifiable symptoms that manifested themselves during January of 2002. It is therefore undisputed that the January symptoms were not temporary—they did not resolve themselves, but instead grew progressively worse." *Id.* at 16a-17a.
- "From a factual standpoint, it is undisputed that plaintiff's January pain was not temporary." *Id.* at 17a.

To demonstrate that the January 2002 symptoms were not temporary, respondent's brief quoted extensively from petitioner's deposition testimony. *Id.* at 14a-16a.

In its brief on appeal, respondent also distinguished the lower-court decisions on which petitioner relied. It argued that, in those cases, unlike in this one, the evidence showed that the plaintiff experienced only "temporary aches and pains of everyday work," and the defendant argued that "it was these random aches and pains that triggered the statute of limitations." App., *infra*, 17a. In this case, respondent argued, "the statute of limitations was not triggered by the temporary aches and pains that plain-

tiff experienced over the course of his career, but instead was triggered in January of 2002, when plaintiff specifically recalls experiencing a new and different pain that did not go away, but became progressively worse." *Id.* at 18a-19a. Respondent's brief thus took the position that petitioner's asserted distinction between temporary and permanent symptoms "has no bearing on this Court's decision." *Id.* at 17a.

In his reply brief on appeal, petitioner stated his understanding that respondent "*concedes* that an employee is not deemed to be 'injured' under the FELA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature." App., *infra*, 22a (emphasis added). Petitioner went on to argue that summary judgment should not have been granted because, according to him, the record permitted a jury to find that he "reasonably believed any pain or symptoms he experienced in January 2002 were temporary in nature, and that he did not experience symptoms sufficient to put a reasonable person on notice that he had suffered an injury until after April 5, 2002." *Ibid.*

The briefs in the court below thus confirm, beyond any doubt, that there was no dispute between the parties as to the governing legal standard and that the only disagreement was over the application of that standard to the record in this case. If the fact that the Florida District Court of Appeal ruled in respondent's favor means that the court should be deemed to have adopted respondent's arguments, then all that court decided was that, under an agreed-upon legal standard and the unique facts of this case, petitioner's suit was time-barred. If that is

what the court decided, moreover, then, far from being "contrary" (Pet. 18) to the decisions on which petitioner relies (Pet. 23-30), the decision below is entirely consistent with them. The other decisions applied the same legal standard and reached a different result only because the evidence in those cases permitted a finding that the plaintiff's pain or symptoms were temporary.[2]

2. To support his contention that the Florida District Court of Appeal rejected the standard he advocates, petitioner relies entirely (Pet. 6, 17, 30-31, 34) on a single sentence from respondent's motion for summary judgment in the trial court. That sentence reads as follows: "The first onset of symptoms, even those minor in nature, creates an affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s)." App., *infra*, 2a. But petitioner is seeking review of the appellate court's decision, not the trial court's, and respondent's arguments in the trial court are not evidence of the basis for the appellate court's unexplained order. That is particularly so because grants of summary judgment are reviewed de novo. See,

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[2] See *Fonseca* v. *Consolidated Rail Corp.*, 246 F.3d 585, 592 (6th Cir. 2001) ("transient" pain); *Green* v. *CSX Transp., Inc.*, 414 F.3d 758, 764 (7th Cir. 2005) ("intermittent" pain); *Coots* v. *Southern Pac. Co.*, 322 P.2d 460, 466 (Cal. 1958) (Spence, J., concurring) ("temporary" symptoms); *CSX Transp., Inc.* v. *Adkins*, 442 S.E.2d 737, 739 (Ga. 1994) ("temporary" symptoms); *Nichols* v. *Burlington N. & Santa Fe Ry. Co.*, 56 P.3d 106, 110 (Col. App. 2002) ("occasional" and "sporadic" pain and symptoms); *Sabalka* v. *Burlington N. & Santa Fe Ry. Co.*, 54 S.W.3d 605, 612 (Mo. App. 2001) ("temporary," "intermittent," and "transitory" pain and symptoms); *Reasons* v. *Union Pac. R.R. Co.*, 886 S.W.2d 104, 109 (Mo. App. 1994) ("temporary" symptoms).

e.g., *Florida Bar* v. *Greene*, 926 So. 2d 1195, 1200 (Fla. 2006).

In any event, the sentence seized upon by petitioner does not suggest that the limitations period would be triggered if the January 2002 symptoms were, in petitioner's words, "merely a temporary result of performing heavy manual labor that would go away, as similar 'little pulls' he had experienced before * * * had gone away." Pet. 18. Even a symptom that has not reached its full severity—*i.e.*, a symptom that may be "minor in nature" (App., *infra*, 2a)—can, depending on the circumstances, put a reasonable person on notice that he has a "permanent compensable condition[]" (Pet. 23) rather than a temporary one. Indeed, in the immediately prior sentence in its motion, respondent argued that summary judgment was proper because petitioner's "own testimony indicates that his symptoms relat[ing] to the injuries he is claiming in the litigation manifested themselves in January 2002 at the latest." App., *infra*, 2a. That language is entirely consistent with what petitioner characterizes as the applicable legal standard: whether he "knew or, with reasonable diligence, should have known before April 5, 2002" that he had sustained the injuries that are "the subject of this action." Pet. 23.

Insofar as petitioner is suggesting that respondent's position in the trial court was that FELA's limitations period is *always* triggered by "[t]he first onset of symptoms, even those minor in nature," App., *infra*, 2a, that suggestion is incorrect. Any such notion is dispelled by the second sentence in respondent's summary-judgment motion after the one on which petitioner relies: "an event resulting in minor physical symptoms *that puts a claimant on notice*

to check for injury constitutes knowledge giving rise to the accrual of a cause of action." *Ibid.* (emphasis added). That language, which also appears in respondent's brief on appeal (*id.* at 19a), makes clear that respondent's position was that the limitations period is triggered by minor symptoms only if—as with any other symptoms—they are sufficient to place the plaintiff on inquiry notice.

3. It is telling that, when petitioner filed his motion for rehearing in the Florida District Court of Appeal, he did not assert—as he asserts here—that the court erroneously held that temporary pain or symptoms can trigger FELA's limitations period. Instead, he argued that the court's error was its conclusion that petitioner's deposition testimony established that his pains and symptoms were not temporary. App., *infra*, 24a-28a.

Petitioner's motion for rehearing said the following:

> Based upon questions from the Court during argument, this Court appears to have been under the misapprehension that in his deposition testimony, Plaintiff stated that the symptoms he experienced in his shoulder and neck in January 2002, were different from the "little pulls" he had temporarily experienced in the past; that in January 2002 he had pain in his neck and shoulders that was different from what he had temporarily experienced in the past; that he had never felt similar pain or symptoms before; and that those symptoms, already different from any he had experienced before, thereafter persisted continuously from January 2002 forward and progressed.

App., *infra*, 25a. The motion went on to argue that

> [t]he answers given at deposition, when all reasonable inferences are drawn in Plaintiff's favor, indicate that Plaintiff did not seek medical attention when he first experienced symptoms in his shoulder and neck for precisely the reason that those symptoms were in fact similar to and not different from the temporary "little pulls" he had experienced previously in his railroad career that had gone away with time, and that he reasonably believed they were similarly temporary in nature as well and would also go away with time.

Id. at 27a.

Petitioner's motion for rehearing thus demonstrates that he initially interpreted the appellate court's decision precisely as respondent does. That is, he agreed that the court had affirmed the grant of summary judgment, not because it believed that temporary pain or symptoms trigger the limitations period, but because it believed that petitioner's January 2002 pain and symptoms were not temporary. Indeed, petitioner reached that conclusion "[b]ased upon questions from the Court [itself] during argument." App., *infra*, 25a. The video of the argument confirms that petitioner's initial view was correct. See http://www.1dca.org/video.html. It shows that the oral argument, like the parties' briefs, proceeded on the premise that temporary pain or symptoms do not trigger the limitations period and that the only issue on appeal was whether the summary-judgment record established that petitioner's January 2002 pain and symptoms were not temporary.

D. The Decision Below Is Correct

As explained above, the dispute between the parties in the lower courts involved only the fact-specific question whether the pain and symptoms petitioner experienced in January 2002 were the typical "pulls" he had previously experienced, as petitioner contended, or the distinct pain and symptoms that were the subject of his lawsuit, as respondent contended. Petitioner does not argue that this Court should grant certiorari to decide whether the summary-judgment record in this case justifies a conclusion that, as a matter of law, the January 2002 symptoms were permanent rather than temporary. But even if he had made such an argument, review would be unwarranted, because this Court rarely grants certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, petitioner's January 2002 symptoms clearly were *not* temporary. At his deposition, petitioner testified without qualification that the pain and symptoms he experienced in January 2002 "kept progressing" and "kept getting worse and worse and worse" over "the next four months or so." 2 C.A. R. 244. That testimony refutes petitioner's assertion that his cause of action did not accrue until after April 5, 2002, and therefore less than three years before he filed suit. That the symptoms differed from the temporary aches and pains he had previously experienced is confirmed by petitioner's ability to recall, at his deposition, precisely when the January 2002 symptoms manifested themselves—namely, when he was "trying to close a door on a boxcar or knock a hand brake off." 2 C.A. R. 246. Petitioner's deposition testimony is corroborated by

his own medical records, which show that, as of July 2002, petitioner's shoulder pain had been "going on for 6-7 months." 3 C.A. R. 336.[3]

In light of this evidence, no rational jury could find that petitioner did not have at least constructive knowledge of his injury more than three years before he filed suit. Accordingly, summary judgment was properly entered for respondent, and the decision below affirming it was correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[3] Petitioner suggests that, even if his pain and symptoms were not temporary, the record does not establish that he first experienced them in January 2002, because his deposition testimony was that he "guess[ed]" he had first experienced the pain and symptoms around that time. Pet. 11 (quoting 2 C.A. R. 244). Petitioner's suggestion is baseless. Despite having had numerous opportunities to correct or clarify the point, petitioner steadfastly held to the January 2002 date throughout both days of ~~his~~ testimony. 1 C.A. R. 35-40; 2 C.A. R. 244-246, 250, 252-253, 255, 263, 266, 260-270.

Respectfully submitted.

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JUNE 2008

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, IN AND FOR ESCAMBIA COUNTY, FLORIDA

JAMES A. METZ, SR.,

Plaintiff,

vs.

CSX TRANSPORTATION, INC.,

Defendant.

CASE NO. 05-625 CA
DIVISION: "F" (SHACKELFORD)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

The Defendant, CSX Transportation, Inc., ("CSXT"), by and through its undersigned counsel, and pursuant to Rule 1.510, *Florida Rules of Civil Procedure*, respectfully requests the Court enter Final Summary Judgment in favor of Defendant and against Plaintiff, as there are no disputed issues of material fact regarding the fact that Plaintiff failed to bring the instant claims prior to the expiration of the applicable statute of limitations, 45 U.S.C. §56.

* * * *

[11] * * * *

C. PLAINTIFF'S CLAIM IS BARRED BY THE FELA STATUTE OF LIMITATIONS

It is clear from the record evidence that Plaintiff, like the Plaintiffs in *Fries*, *McAleer*, and *Butler*, and *Wagner*, failed the objective standard requiring him to exercise his affirmative duty to investigate the

potential cause of his injuries within the three (3) year statute of limitations period of 45 U.S.C. §56. Plaintiff's own testimony indicates that his symptoms related to the injuries he is claiming in the litigation manifested themselves in January 2002 at the latest.

The first onset of symptoms, even those minor in nature, creates an affirmative duty upon the Plaintiff to investigate the nature of the suspected injury and the potential cause(s). *Kubrick*, 444 U.S. at 123, 100 S.Ct. at 360; *Fries*, 909 F.2d at 1097; *Albert*, 905 F.2d at 544; *Wilson*, 1997 WL 633590 at 6; *Czyzewski*, 1997 WL 9791 at 4. In *Fries*, the Seventh Circuit held that tolling the statute of limitations until the Plaintiff received actual medical diagnosis that he was suffering from tinnitus is not the proper method for the accrual of the limitations period. *Fries*, 909 F.2d at 1096 [12] (citing *Nemmers v. United States*, 795 F.2d 628 (7th Cir. 1986) and *Drazan v. United States*, 762 F.2d 56 (7th Cir. 1985)). In fact, an event resulting in minor physical symptoms that puts a claimant on notice to check for injury constitutes knowledge giving rise to the accrual of a cause of action. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991).[5]

* * * *

---

[5] *See also, Billman v. Mo. Pac. Ry. Co.*, 825 S.W.2d 525 (Tex.App. 1992) (a critical fact causing claim to accrue can be an event that puts claimant on notice to check for injury even if it results only in minor physical effects); (*Lechowicz v. Consol, Rail Corp.*, 954 N.Y.A.D. 484 (N.Y.A.D. 4 Dept. 1993) ("[U]pon experiencing symptoms a Plaintiff has a duty to investigate both the injury and any suspect cause."); *Stachowski v. Consol. Rail Corp.*, 594 N.Y.S.2d 487, 488 (N.Y.A.D. 4 Dept. 1993) (it is when Plaintiff's problem "*first manifest[s]*" itself and Plaintiff "*suspect[s]*" that his employment is the cause, that the limitation period begins to run); *Fries v. Chicago Northwestern Transp. Co., supra.* (7th Cir. 1990) (awareness of critical facts imposes duty to investigate).

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER: 1D07-617

JAMES A. METZ, SR.

Appellant-Plaintiff,

v.

CSX TRANSPORTATION, INC.

Appellee-Defendant.

A DIRECT APPEAL OF A JUDGMENT FROM THE
CIRCUIT COURT, FIRST JUDICIAL CIRCUIT,
ESCAMBIA COUNTY, FLORIDA

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* * * *

[21] * * * *

For purposes of when a railroad employee knows or, in the exercise of reasonable diligence, or should know the essential facts of his injury, there is a distinction between permanent compensable conditions and symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature. An employee is not deemed "injured" under the FELA, and his cause of action does not accrue, when an employee experiences pain or symptoms which he reasonably presumes or believes to be temporary. A number of decisions illustrate this principle.

Ray v. Illinois Central Railroad Co., 864 F.Supp. 569 (E.D. La. 1994), involved an FELA claim for Morton's neuroma, a condition in which the nerves in the balls of the feet are exposed, due to walking on slag as part of his duties for railroad, filed on February 9, 1994. Plaintiff had complained to supervisors about discomfort from walking on slag in the 1970's and 1980's. In the 1980's, he knew that walking on slag was causing pain in his feet. His occasional pain became fairly constant prior to 1991, more than three years prior to the filing of his action, but plaintiff did not realize the pain was severe enough to seek medical treatment until 1992, when a doctor advised [22] him that he had Morton's neuroma. The railroad's motion for summary judgment on statute of limitations grounds was denied because, on these facts, there was a factual issue as to when he knew or should have known he had suffered an injury. The court stated that:

> While there does appear to be no dispute that plaintiff knew his feet

> hurt because he walked upon slag, there is considerable dispute when plaintiff knew he suffered an injury. While plaintiff knew his feet hurt, there is a factual issue whether the pain in his feet should have caused him to seek medical attention sooner such that he could have discovered he had Morton's neuroma. Defendant may succeed in convincing the factfinder that his complaints were such that a reasonable man would have sought medical attention sooner, but this is a question of fact in dispute.

Ray, 864 F.Supp. at 570.

In *Sabalka v. Burlington Northern and Santa Fe Ry. Co.*, 54 S.W.2d 505, 609 (Mo.App.2001), the employee filed his FELA action on December 26, 1996, alleging that he had suffered injuries to his hands and wrists from years of exposure to vibrating power tools used in his job as a carman. In 1988 or 1989, he began to experience pain in his right hand and wrist that he associated with the use of hammers, sledge hammers and staple guns on the job. When he saw a doctor in 1994, he told the doctor that when he experienced this pain in the past, he took aspirin and the pain resolved. The pain was intermittent and transitory, [23] and would not recur for several months. There was no evidence that this pain incapacitated him. There was no evidence plaintiff would not have considered his symptoms as merely temporary inflammation. In 1994, he began to have increasing pain and symptoms that were not relieved by aspirin, and which he stated were different from the intermittent symptoms he had

experienced prior to that time. He first saw a doctor in 1994, and was eventually diagnosed with a permanent injury to his hands and bilateral ulnar nerve injury. The court held that "there is a difference between having an injury of the type for which a claim for compensation can be filed, and an intermittent pain which is presumed to be a temporary condition, and which is resolved quickly by the taking of an analgesic such as aspirin." *Sabalka*, 54 S.W.2d at 610. In applying the United States Supreme Court's holding in *Urie*, that the employee can be considered injured only when the accumulated effect of the deleterious exposure manifests itself, the court held:

> The [Supreme] court did not rule that the employee is considered injured whenever the employee is aware of any symptom, even a temporary symptom. Rather, it is a matter of when the employee should be aware that there is an injury of a compensable nature.

Sabalka, 54 S.W.2d at 611 (bracketed material supplied).

[24] In holding that the trial court had erred in instructing the jury on the statute of limitations, because there was no evidence to support the instruction, and reversing a defense verdict, the *Sabalka* court stated that:

> Indeed, we believe it would have seemed foolish to him to file a claim for compensation under the FELA prior to December 26, 1993. At that time, he had no lingering symptoms and no substantiation of any injury.

> He had not suffered symptoms severe enough to cause him to consult a physician about his right hand or wrist. Sabalka had absolutely no symptoms in his left hand. The intermittent symptoms did not create awareness that he was suffering from a bodily condition causing incapacity.

Sabalka, 54 S.W.2d at 612. *See also Coots v. Southern Pacific Company*, 49 Cal.2d 805, 814, 322 P.2d 460, 466 (en banc 1958) (FELA claim based on occupational dermatitis) (concurring opinion of Justice Spence) ("[I]t does not comport with sound public policy to require an employee, at his peril, to engage in litigation with his employer, when an apparently minor and temporary manifestation of skin trouble occurs."); *Fonseca v. Consolidated Rail Corporation*, 246 F.3d 585, 592 (6th Cir. 2001) (if plaintiff had filed suit at an earlier time, "without any medical evidence beyond his transient aches and pains after a long days work, the railroad would likely have claimed that the action lacked any evidentiary support).

[25] In *Reasons v. Union Pacific R. Co.*, 886 S.W.2d 104 (Mo.App.1984), the plaintiff employee alleged that he had developed occupational asthma as a result of his work environment over a period of 14 years. While at work, he was exposed to asbestos, strong odors from diesel engines, cleaning agents, chemicals, spray paints, dust particles and fumes from welding around motor grease and fuel oils. He experienced chest tightening, burning watery eyes, runny nose, throat tightening and difficulty in breathing while at work, but did not suffer these symptoms after he left the workplace. The employee believed that his exposure to these substances

triggered his allergies or that the symptoms he experienced were simply a normal temporary reaction to exposure to these substances similar to those anyone would experience under similar circumstances. He did not believe these symptoms were evidence of a slowly manifesting permanent condition. His allergist had informed him more than ten years before he filed his action that his working conditions were aggravating his "symptoms" and had recommended that he wear a filtering apparatus or respirator at work. Another doctor he consulted had informed him 5 years before he filed his action that he believed there might be connection between the employee's work and his respiratory problems. The court held that this [26] was insufficient to hold as a matter of law that the employee was aware of his condition and its cause beyond the statute of limitations time frame. The court explicitly acknowledged the statement in *Fries v. Chicago Northwestern Transportation Co.*, 909 F.2d 1092, 1096 (7th Cir. 1990) that to allow an employee to "unilaterally postpone the running of the statute of limitations by negligently failing to investigate the fact and cause of his injury would thwart the legislative intent" of the statute of limitations. The court nevertheless held that:

> [I]t is not enough to suspect a problem and a causal connection to start the statute of limitations ticking; one must either know of the problem and the probable connection or actively ignore a manifest problem which would be apparent to a reasonable person . . . . It is knowledge, and not speculation,

> which triggers the statute of limitations.

Reasons, 886 S.W.2d at 108-109. The court went on to state that:

> We refuse to abrogate a person's cause of action when it is unclear whether the employee was truly aware of the permanency of the problem. While there is no question employee knew his occupational conditions irritated him when he was at work, in order to find the statute of limitations has expired, we must find the employee was aware the he had sustained permanent damages that would not go away when he left his job site.

Reasons, 886 S.W.2d at 109.

[27] In *Nichols v. Burlington Northern and Santa Fe Railway Co.*, 56 P.3d 106 (Colo.App. 2002), plaintiff claimed cumulative injury to his upper back and neck. Plaintiff had three chiropractic visits concerning neck symptoms more than three years prior to filing suit. He also made statements indicating that he knew more than three years prior to filing suit that the locomotive seats he used on the job were causing him discomfort and exacerbating his neck and back pain. The court distinguished intermittent pain that is presumed to be temporary and quickly resolved from permanent cumulative injury. The court held that it was not established as a matter of law that the plaintiff knew he had a permanent cumulative injury and that a reasonable jury could conclude that prior to the limitations period plaintiff did not have reason to know that he

had a work-induced cumulative injury to his neck and spine.

In *Green v. CSX Transportation, Inc.*, 414 F.3d 758, 763 (7th Cir. 2005), one of plaintiff's claims was for cumulative injury to her right shoulder. There was evidence that she had experienced pain in her right shoulder on several occasions more than three years prior to filing her action, that she was aware that the pain she experienced was related to her work on the railroad, and that had [28] sought medical treatment right shoulder pain at least once more than three years prior to filing her action. The Court of Appeal reversed a summary judgment entered in favor of CSXT on that claim. The Court noted that none of these reports related to symptoms of right shoulder pain had been shown to be serious enough to put plaintiff on notice "that it was time to sue her employer or lose her right to do so." *Green*, 414 F.3d at 764. The court recognized that some manifestations of injury are sufficiently minimal that "a reasonable person would not consider whether he was injured or that it was appropriate to make inquiry." *Green*, 424 F.3d at 764 (citations omitted). The Court held that plaintiff had the right for a jury to decide whether her shoulder issues outside the limitations period put her on notice that she had suffered a cognizable work related injury and "whether a reasonable person in her circumstances would have realized she had suffered more than a *de minimus* cumulative injury to her right shoulder and that the injury was work related." *Green*, 424 F.3d at 764-765. See *Sandoval v. Union Pacific Railroad Co.*, 396 F.Supp. 1269, 1272-1273 (D. New Mex. 2005) (discussing *Green* and *Ray v. Illinois Central*). *See also CSX Transportation Inc. v. Adkins*, 264 Ga. 203, 442 S.E.2d 737 (1994), *cert. denied*, 513 U.S. 947

(1994); *Kemp v.* [29] *Burlington Northern R. Co.*, 930 S.W.2d 10 (Mo.App.E.D. 1996); *Monaghan v. Union Pacific Railroad Co.*, 242 Neb. 720, 729, 496 N.W.2d 895, 901 (1993).

In this case, as will be discussed below, there is an issue of material fact as to when, in the exercise of reasonable diligence, plaintiff knew or should have known that he had sustained an "injury" under the foregoing rules, and thus an issue of material fact as to whether his cause of action accrued prior to April 5, 2002. This is an issue of fact that should be determined by a jury.

* * * *

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER: 1D07-617

JAMES A. METZ, SR.
Appellant-Plaintiff,

v.

CSX TRANSPORTATION, INC.
Appellee-Defendant.

A DIRECT APPEAL OF A JUDGEMENT FROM
THE CIRCUIT COURT, FIRST JUDICIAL
CIRCUIT, ESCAMBIA COUNTY, FLORIDA

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[23] The first argument made in plaintiff's brief is that the pain he felt in January of 2002 was only a "temporary" symptom. According to plaintiff, the law recognizes a distinction between "permanent compensable conditions and symptoms of pain or discomfort that the employee reasonably believes to be temporary in nature." (Plaintiff's brief, p. 21.) According to plaintiff, a cause of action does not accrue under the FELA when an employee believes his pain or symptoms to be temporary.[8] *Id.* In support of this argument, plaintiff cites to numerous cases which he claims to illustrate this principle. CSXT does not dispute the general premise of plaintiff's argument or that the cases he cites support this argument. However, this argument nevertheless fails, for several reasons.

The primary problem with plaintiff's argument is that his deposition testimony shows that plaintiff's symptoms manifested themselves in such a way that plaintiff knew, or in the exercise of reasonable diligence should have known, in January of 2002 that he had suffered a compensable injury. While plaintiff had experienced temporary symptoms [24] or "pulls" throughout his employment with the railroad, the symptoms he experienced in January of 2002 were different and distinguishable. By plaintiff's own admission, these symptoms were not "temporary in nature," but instead progressively worsened from their onset in January:

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[8] To the extent this argument could be construed as plaintiff taking the position that the statute was not triggered in January of 2002 because the symptoms had not fully manifested themselves and plaintiff was therefore not fully aware of his injuries, this argument is discussed and disposed of in section I(B)(1)(b)(3), *infra*.

Q. When did you first notice symptoms of a problem with your shoulders and neck area?

A. I guess around January of 2002. Something like that. Around that area.

Q When you first began experiencing those symptoms, did you go see a doctor?

A. No. Because I thought it was just like a, you know, a little pull or something, you know, **but it kept progressing.**

Q. Had you had little pulls before over your career working?

A. Oh, yes. You know, I don't know what you call it. I'm not a doctor, so I don't know what you would call it. But anyway, **this (indicating) just kept getting worse and worse and worse.** I figured, well, it will ease off. It will ease off. But it didn't. I was eating BCs and BCs.

Vol. II, p. 244.

Q. How much later was it after the initial conversation you think you had that you told him you needed to go to the doctor?

A. **I guess it progressively got worse. My guess over the next four months or so,** you know, and then it got to where it just - when I picked my arm up to do something, it hurt, so.

Vol. II, p. 251 (emphasis added).

[25] That the January symptoms were different from the temporary symptoms that plaintiff experienced over the course of his career is also highlighted by the fact that plaintiff was able to

recall, with some detail, a specific event (or a specific day) when the symptoms for which he seeks compensation in this lawsuit manifested themselves:

Q. Was there anything in particular that you did physically in January of 2002 when you first noticed the symptoms in your shoulder area and neck area that brought on those symptoms?

A. I can't remember if I was trying to close a door on a box car or knock a handbrake off. I can't remember – something is when I – I can't remember. Because we – it was a load of roll of papers I remember that on the car, so when I was trying to pull – pry the door closed, we closed the load up and keep them from falling out of the car.

Q. But you really don't know what it was that brought on the symptoms?

A. No. But I remember that hurting pretty bad something there hurt. You know.

Q. Have you had time –

A. Or maybe discomfort is what it was more than just this pain and then I had a bad time with the hand brake wheel that give me a fit and you have to go by and knock the brake off. That's when I started, you know (indicating) reaching up to knock them off.

Vol. II, p. 246

* * *

Q. Were you successful in knocking the hand brake off?

[26]A. Burned the chain in two with a torch to relieve the tension. That's how tight it was. Changed the hand brake out as far as I know.

Q. Is this something you have a specific recollection of doing this in January of 2002?

A. Well, yes.

Q. And are you certain that you were injured doing that?

MR. WILLIAMS: Well, I object. He's never said that he was injured doing that. He said he felt the symptoms at that time.

Q. Are you certain that you felt symptoms of pain in your shoulders and neck while attempting to knock the hand brake off –

A. Yes.

Q. – of the car in January 2002?

A. Yes.

* * *

Q. Let me do it again and I didn't intend to try to state it any differently. Are you certain that you felt symptoms of pain in your shoulders and neck while attempting to close the door on a box car in January of 2002?

A. Yes.

Vol. II, pp. 252-253 (emphasis added).

It is clear that plaintiff differentiated between the temporary aches and pains (or "pulls") that he

experienced during the course of his career and the new and specifically identifiable symptoms that manifested [27] themselves during January of 2002. It is therefore undisputed that these January symptoms were not temporary – they did not resolve themselves, but instead grew progressively worse.

From a factual standpoint, it is undisputed that plaintiff's January pain was not temporary. Plaintiff's argument whereby he distinguishes between temporary and permanent compensable symptoms therefore has no bearing on this Court's decision. Moreover, the cases that plaintiff cites to support this argument clarify the irrelevance of this argument. In these cases, the facts generally reveal that the plaintiffs experienced random aches and pains (comparable to the "pulls" that plaintiff described during his deposition and the "symptoms of pain or discomfort that a plaintiff reasonably believes to be temporary" as described in plaintiff's brief) during the course of their employment. The defendants in those cases argued, **unlike CSXT in the instant case,** that it was these random aches and pains that triggered the statute of limitations.

In response to this argument by the defendants, the plaintiffs argue, and the respective courts hold, that the statute of limitations is not triggered by these temporary aches and pains of everyday work, but instead that the statute starts to run when the plaintiff does something [28] that either causes a specific awareness of a new and different symptom or causes him to experience marked pain. *See, e.g., Green v. CSX Transp. Inc.*, 414 F.3d 758 (7th Cir. 2005) (intermittent complaints of pain over the years did not trigger statute of limitations, but acute, different pain [such as that that plaintiff suffered in January of 2002] did); *Nichols v. Burlington*

Northern and Santa Fe Railway Co., 56 P.3d 106 (Colorado Ct. App. 2002) (court looked to time when plaintiff had a distinct symptoms as trigger rather than to occasional complaints outside of statute of limitations); *Sabalka v. Burlington Northern and Santa Fe Railway Co.*, 54 S.W.3d 605 (Mo. App. 2001) (it was not the intermittent transitory pains that plaintiff felt throughout the course of his employment [which the court described as temporary] that triggered the statute of limitations, but instead was only when plaintiff experienced more constant and severe pain that the his claim accrued); *Fonseca v. Consolidated Rail Corp.*, 246 F.3d 585 (6th Cir. 2001) (statute was not triggered by repetitive but temporary normal discomforts of a day's work that plaintiff experienced while using hand tools and power tools at work, but was instead triggered when he developed intensified persistent pain that would not go away); *CSX Transp., Inc. v. Adkins*, 442 S.E.2d 737 (Ga. 1994) (statute [29] not triggered by symptoms of exposure that plaintiffs suffered more than three years before they filed their lawsuit since these were not the same as symptoms of degenerative brain disease, the injury for which they sought compensation).[9]

The holdings in these cases is completely consistent with CSXT's argument and the trial court's ruling – the statute of limitations was not triggered by the temporary aches and pains that plaintiff experienced over the course of his career,

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[9] *Reasons v. Union Pacific Railroad Co.*, 886 S.W.2d 104 (Mo. Ct. App. 1994) is also cited by plaintiff in this section of his brief. *Reasons* is inapplicable to the instant case, however, because the primary issue therein was when plaintiff knew that his symptoms were work–related, which is not an issue in this case.

but instead was triggered in January of 2002, when plaintiff specifically recalls experiencing a new and different pain that did not go away, but became progressively worse.

* * * *

[33] * * * *

3) **No Legal Significance Attaches to the Fact That Plaintiff's Symptoms May Not Have Reached Their Maximum Severity in January of 2002.**

Just as the statute is not tolled until such time as plaintiff goes to the doctor and receives a medical diagnosis, it is likewise not tolled until the symptoms reach their maximum severity. *Roberts v. Lain*, 32 S.W.3d 264, 269 (Tex. App. San Antonio 2000) ("Discovery" does not hinge on knowledge of the seriousness of the injury); *Williams v. Southern Pacific Transp. Co.*, 813 F.Supp. 1227, 1232 (S.D. Miss. 1992) (not necessary for injury to reach maximum severity before cause of action accrues). In fact, even an event resulting in minor physical symptoms that puts a claimant on notice to check for injury constitutes knowledge giving rise to the accrual of a cause of action. *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991). *See also Billman v. Mo. Pac. Ry. Co.*, 825 S.W.2d 525 (Tex. App. 1992) (a critical fact causing claim to accrue can be an event that puts claimant on notice to check for injury even if it results only in minor physical effects); *Pinczkowski v. Norfolk Southern Railway Co.*, 571 S.E.2d 4 (N.C. Ct. App. 2002) (plaintiff's claim accrued at least [34] five years before his problems became severe); *Swindell v. Florida East Coast Railway, LLC*, 2005 WL 238764, *6 (M.D. Fla. 2005) ("statute of limitations commences when the injury is

noticed and before it reaches maximum severity, not when it is later diagnosed").

* * * *

APPENDIX D

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

APPEAL NUMBER: 1D07-617

JAMES A. METZ, SR.

Appellant-Plaintiff,

v.

CSX TRANSPORTATION, INC.

Appellee-Defendant.

A DIRECT APPEAL OF A JUDGMENT FROM
THE CIRCUIT COURT, FIRST JUDICIAL
CIRCUIT, ESCAMBIA COUNTY, FLORIDA

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* * * *

[4] * * * *

CSXT concedes that an employee is not deemed to be "injured" under the FELA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature. See Answer Brief at 23 ("CSXT does not dispute the general premise of plaintiff's argument or that the cases he cites support this argument"). CSXT also seems to accept the view that to "trigger" the statute of limitations the "manifestation of symptoms" must be "sufficient to put a [5] reasonable person on notice that he has suffered an injury." Answer Brief at 32.

* * * *

[7] * * * *

As noted above, on summary judgment the evidence must be construed in the light most favorable the non-moving party and the court must draw every possible inference in favor of the non-moving party. When the record is reviewed under this standard, it is apparent that a jury could find that plaintiff reasonably believed any pain or symptoms he experienced in January 2002 were temporary in nature, and that he did not experience symptoms sufficient to put a reasonable person on notice that he had suffered an injury until after April 5, 2002. This is Plaintiff's argument, and the discussion in support of this argument is set forth [8] in full at pp. 30 to 40 of Plaintiff's initial Brief. Several point bear emphasis and further explanation.

* * * *

APPENDIX E

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT OF FLORIDA

JAMES A. METZ, SR.

Appellant- Plaintiff,

v.

CSX TRANSPORTATION, INC.

Appellee-Defendant.

APPEAL NUMBER: 1D07-617

Lower Case No. 05-CA-625

MOTION FOR REHEARING AND/OR CLARIFICATION, AND FOR A WRITTEN OPINION

Plaintiff and Appellant, James A. Metz, Sr. ("Plaintiff"), by and through counsel, respectfully moves pursuant to Rule 9.330, Florida Rules of Appellate Procedure, for rehearing and/or clarification, and for a written opinion. In support of this motion, Plaintiff states as follows:

1. On October 29, 2007, this Court entered a *per curiam* opinion and order ("PCA") affirming the trial court's final order granting summary judgment in favor of Defendant and Appellee, CSX Transportation, Inc. ("CSX").

2. The trial court granted summary judgment based upon the three year statute of limitations applicable to this action under Federal Employers' Liability Act ("FELA"). 45 U.S.C. § 56, and also struck Plaintiff's affidavit, filed in support of his opposition to the motion for summary judgment,

based upon CSX's claims that the affidavit was in conflict with Plaintiff's deposition testimony.

3. To place the points to be made in this Motion in context, under the test that governs accrual under the discovery standard applicable in this cumulative [2] injury case a cause of action accrues under the FELA when a reasonable person knows or, in the exercise of reasonable diligence, should have known of both (l) the injury that is the basis of his action, and (2) the governing the cause of the injury. An employee is not deemed to be "injured" under the FELA, and his cause of action does not accrue, when the employee experiences pain or symptoms he reasonably presumes or believes to be temporary in nature. When as here, the question is when a reasonable person knew or should have known that he had sustained a compensable injury, as opposed to pain or symptoms he reasonably believed to be temporary in nature, the factual inquiry is therefore more narrowly when a reasonable person in the same or similar circumstances as the plaintiff, and in the exercise of reasonable diligence, would have first sought medical attention for the injury at issue.

4. It is most respectfully submitted that in affirming the trial court that this Court was under a misapprehension as to exactly what answers Plaintiff gave in his deposition concerning when he experienced symptoms in his shoulders or neck, and the nature of those symptoms, as opposed to the inferences drawn by the CSX as to these issues from Plaintiff's deposition testimony. It is well established that on summary judgment, all inferences are to be drawn in favor of the party opposing summary judgment, in this case Plaintiff.

5. Based upon questions from the Court during argument, this Court appears to have been under the misapprehension that in his deposition testimony, Plaintiff stated that the symptoms he experienced in his shoulder and neck in [3] January 2002, were different from the "little pulls" he had temporarily experienced in the past; that in January 2002 he had pain in his neck and shoulders that was different from what he had temporarily experienced in the past; that he had never felt similar pain or symptoms before; and that those symptoms, already different from any he had experienced before, thereafter persisted continuously from January 2002 forward and progressed. That was the inference that CSX sought to draw from Plaintiff's deposition in both the trial court and in its Answer Brief in this Court (see CSX's Answer Brief at 1-2, 21, 23-26) but it does not accurately represent the actual answers given by Plaintiff, or the inferences that may be reasonably drawn from those answers if the all inferences are drawn favor of the Plaintiff. CSX's argument in this regard did not in any way distinguish between the actual answers given by Plaintiff and the inferences CSX drew in its own favor from Plaintiff's answers.

6. The Second District Court of Appeal has very recently held that:

> The principle that a party defending a motion for summary judgment is entitled to all reasonable inferences in his or her favor "includes giving to the previous deposition any reasonable meaning which will not conflict with the subsequently filed affidavit." *Koflen v. Great Atl.&Pac. Tea Co.*, 177 So. 2d 529, 531 (Fla. 3d DCA 1965).

Ouelette v. Patel, No. 2D06-3397 (Fla. 2nd DCA 2007) (November 9, 2007) slip opinion at p. 8. Here the description of Plaintiff's deposition in CSX's Brief [4] instead drew all inferences against Plaintiff and in favor of CSX. The questions from the Court during argument thus suggest that the Court was under a misapprehension as to the actual answers given by Plaintiff at deposition in this regard, and instead accepted this description of Plaintiff's answers by CSX based upon inferences drawn by CSX in its own favor, rather than the actual answers given by Plaintiff, as an accurate description of Plaintiff's actual answers at deposition. The affirmance in this case is in conflict with the above cited cases and principles.

6. The key portions of the Plaintiff's deposition answers appear in the record at Depo. I: 120-127; Vol. II: 244-251.[1] Review of the answers actually given by Plaintiff on deposition, as opposed to the inferences drawn from those answers by CSX, indicates that the deposition may be reasonably read under the foregoing standard to be both consistent with the affidavit Plaintiff filed in support of his opposition to CSX's motion for summary judgment (Vol III: 326-327), and sufficient to create a genuine issue of material fact for trial as to when Plaintiff's cause of action accrued under the applicable discovery standard (especially when considered along with the records of Plaintiff's negative medical

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[1] Plaintiff's deposition is in two volumes contained in Vol. I: 26-124 and Vol. II: 125-274 of the Record on Appeal. References to Plaintiff's deposition are to both the volume and page number of the deposition transcript itself, and then to the volume and page number as paginated for the Record on Appeal. A reference to page 6 of Vol. I of Plaintiff's deposition, which is also page 130 of Vol. II of the Record on Appeal, is shown as follows: (Depo.I: 6; Vol.II: 130).

examinations on [5] March 1 and March 19, 2002, and his subsequent positive examination on May 6, 2002).

7. The answers given at deposition, when all reasonable inferences are drawn in Plaintiff's favor, indicate that Plaintiff did not seek medical attention when he first experienced symptoms in his shoulder and neck for precisely the reason that those symptoms were in fact similar to and not different from the temporary "little pulls" he had experienced previously in his railroad career that had gone away with time, and that he reasonably believed they were similarly temporary in nature as well and would also go away with time. He did not experience those symptoms on any continuous basis at the outset; he experienced them only when doing work activities and they went away when he was not doing railroad work. His answers indicate that at some *later* point in time, his symptoms progressed so that they became more severe and did not go away. But his answers at deposition do not indicate *when*, during the subsequent four months, his symptoms "progressed" to become continuous and more severe. That is because he was never asked at deposition to state at what point in time he in fact experienced symptoms that were different from the temporary "little pulls" of the past; he was never asked when his symptoms no longer went away and instead became persistent and continuous; he was not asked to state at what point in time he experienced symptoms that had progressed to the point where he could no longer lift his arm. A jury could reasonably conclude from Plaintiff's deposition testimony and his medical records – particularly those of his two medical [6] examinations in March 2002 that were completely negative for any neck of shoulder

problems after actual examination of his neck and extremities – that any pain Plaintiff experienced in his shoulders prior to May 2002 was similar to the temporary "little pulls" be had previously experienced from time to time. Plaintiff reasonably expected these "little pulls" to be temporary in nature, as they had been before, and it is very clear that such pain as he experienced was intermittent and went away when he was not engaged in work activities. No "progression" to anything constant or more severe had occurred as of when Plaintiff had his two negative medical examinations in March 2002 in which his shoulders and neck were actually examined without any positive findings, and with the negative findings showing no problems with the neck or shoulders documented in the records. A jury could reasonably conclude from this evidence that any such "progression" did not occur until May 2002 when Plaintiff went to Dr. Pace to report pain in his right shoulder, and when examination first revealed positive findings in his right shoulder, and that Plaintiff's cause of action therefore did not accrue until after April 5, 2002.[2]

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[2] The records of the examinations in March and May, 2002 appear in the record at Vol. III: 328-335.